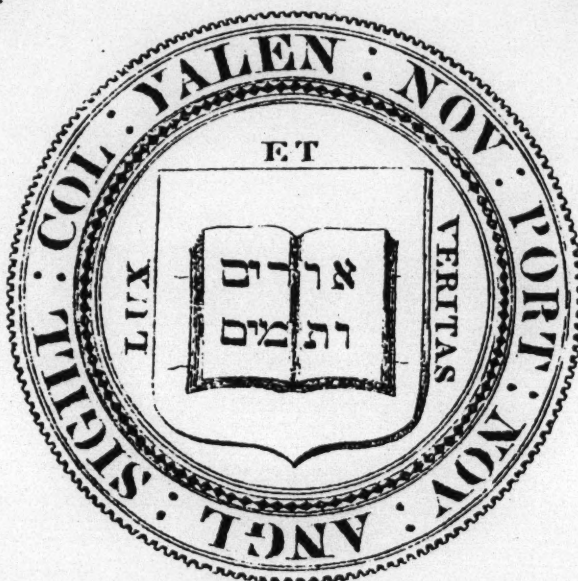


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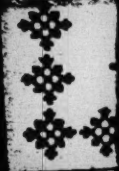


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Hubbard
T H E ~~18-5-27~~
English-Man's
12-8-31
Right. *φ*
he
A *Hand*
DIALOGUE
BETWEEN A
Barrister at Law,
And a
JURY-MAN.

Plainly setting forth

- | | |
|-----------------------------------|--------------|
| I. The Antiquity | } of Juries. |
| II The excellent designed use | |
| III The Office & just Priviledges | |

By the Law of England.

London, Printed for Richard Janeway, &
Re printed at Boston, by Benjamin
Harris. 1693.



*The English Mans Right, &c.**Barriſter.*

MY old *Client* ! a good morning to you, whither ſo faſt ? you ſeem intent upon ſome important affair ?

Furyman, Worthy Sir ! I am glad to ſee you thus *opportunely*, there being ſcarce any Perſon that I could at this time rather have wiſht to meet with.

Barr. I ſhall eſteem my ſelf happy, if in any thing I can ſerve you. --- The *buſſneſs* I pray ?

Furyman, I am ſummon'd to appear *up-on a Fury*, and was juſt going to try if I could get off. Now I doubt not but you can put me into the beſt way to obtain that favour.

Barr. 'Tis probable I could. But firſt let me know the *reaſons* why you deſire to decline that ſervice.

Furym. You know, Sir, there is ſomething of trouble and loſs of time in it ; and mens *Lives, Liberties, and Eſtates* (which depend upon a Jury's *Guilty, or Not Guilty*, for the Plaintiff, or for the Defendant) are *weighty things*. I would not wrong my Conſcience for a world, nor be acceſſary to any mans ruin. There are others *better ſkill'd* in ſuch matters. I have ever ſo loved peace, that I have forborn going to Law.

2 The Jury mans

(as you well know many times) though it hath been much to my los.

Barr. I commend your *tenderneſs* and *modesty*; yet muſt tell you, theſe are but general and *weak* excuses. As for your time trouble, 'tis not *much*; and however can it be better ſpent than in doing *Juſtice*, and ſerving your Country? To withdraw your ſelf in ſuch caſes, is a kind of *Sacriledg*, a robbing of the publick of thoſe duties which you juſtly owe it; the more *peaceable* man you have been, the more *fit* you are. For the office of a *Jury-man* is, *conſcientiouſly* to judg *his neighbour*; and needs no more *Law* than is eaſily learnt to direct him therein. I look upon you therefore as a man well-qualified with *eſtate*, *diſcretion*, and *integrity*; and if all ſuch as you, ſhould uſe private means to avoid it, how would the King and Country be honeſtly ſerved? At that rate we ſhould have none but *Fools* or *Knaves* intruſted in this grand concern, on which (as you well obſerve) the Lives, Liberties, and Eſtates of all *Engliſhmen* depend.

Your *Tenderneſs* not to be acceſſary to any mans being wrong'd or ruin'd, is (as I ſaid) much to be commended. But may you not incur it unawares, by ſeeking thus to avoid it? *Pilate* was not innocent becauſe he waſht his hands, and ſaid, He would have
nothing

nothing to do with the blood of that just one.

There are faults of *Omission* as well as *Commission*. When you are legally call'd to try such a cause, if you shall shuffle out yourself, and thereby Persons perhaps less conscientious happen to be made use of, and so a villain elcapes justice, or an innocent man is ruined by a *Prepossest* or negligent Verdict; can you think your self in such a case wholly blameless? *Qui non prohibet cum potest, jabet*: He abetes evil, that prevents it not when he may. *Nec caret serupulo societatis occulta qui evidenter facinori desinit obviare*: He deserves not to be free from the suspicion of a close society, or under-hand conspiracy in the mischief of subverting the fundamental Laws and Liberties of the Nation, who ceases to obviate and oppose it.

Juryman. Truly I think a man is bound to do all the good he can, especially when he is lawfully call'd to it. But there sometimes happen nice cases, wherein it may be difficult to discharge ones conscience without incurring the displeasure of the Court, and thence trouble and damage may arise.

Barrister. That is but a vain and needless fear. For as the Jurors priviledges (and every English-mans in and by them) are very considerable; so the Laws have no less providently guarded them against Invasion or *Ullurpation*. So that there needs no

4 The Jurymans

more than first *Understanding* to know your duty, and in the next place *courage* and *resolution* to practise it with impartiality and integrity, free from accursed *bribery* and *malice*, or (what is full out as bad in the end) *base* and *servile fear*.

Jurym. I am satisfied, that as 'tis for the *advantage* and honour of the publick, that men of *understanding*, *substance*, and *honesty* should be employ'd to serve on Juries, that *justice* and *right* may fairly be administred; so 'tis their *own* interest when called thereunto, readily to bestow their attendance and service, to prevent *ill presidents* from men otherwise qualified; which may by degrees *fatally*, though insensibly, undermine our Just Birth-rights, and perhaps fall *heavy* one day upon us, or our posterity. But for my own part, I am fearful lest I should suffer through my *ignorance* of the duty & office of a Jury-man, and therefore on that account principally it is, that I desire to be excused in my appearance, which if I understood but so well as I hope many others do, I would with all my heart attend the service.

Barr. You speak honestly, and like an *English-man*. But if that be all your cause of scruple, it may soon be removed, if you will but give your self a very little trouble of inquiry into the necessary provisions of the

Docket Book

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the Law of *England* relating to this matter.

J. There is nothing (of a *temporal* concern) that I would more gladly be informed in, because I am satisfied, 'tis very *expedient* to be generally known. And first I would learn *how long* trials by Juries have been used in this Nation.

B. Even *time out of mind*; so long that our best *Historians* cannot date the Original of the Institution, being indeed *cotemporary* with the Nation it self, or in use as soon as the people were reduced to any form of *Civil Government*, and administration of Justice. Nor have the several Conquests or Revolutions, the mixtures of *For* *reigners*, or the mutual feuds of the *Natives*, at any time been able to suppress or overthrow it. For,

1. That Juries (the *thing* in effect and *Substance*, though perhaps not just the number of *Twelve* men) were in use amongst the *Britains* the first Inhabitants of this Island, appears by the Ancient Monuments and Writings of that Nation, attesting that their *Freeholders* had always a *share* in all Tryals and determinations of differences.

2. Most certain it is, that they were practised by the *Saxons*, and were then the *only Courts*, or at least an essential, and the greater part of all Courts of Judicature :

The Antiquity of Trialls by Juries

For

6 The Jury men

For so (to omit a multitude of other Instances) we find in King * *Ethelreds* Laws. *In singulis Centurijs, &c.* In every Hundred let there be a Court, and let Twelve ancient Free men, together with the Lord, or rather according to the Saxon, the Greve, i. e. the chief Officer amongst them, be sworn, That they will not condemn any person that is Innocent, nor acquit any one that is guilty,

3. When the * Normans came in, *William*, though commonly called the Conqueror, was so far from abrogating this Priviledg of Juries, That in the fourth year of his Reign, he confirmed all King *Edward the Confessors* Laws, and the ancient Customs of the Kingdom (whereof this was an essential and most material part). Nay, he made use of a Jury chosen in every County, to report and certifie on their Oaths what those Laws and Customs were ; as appears in the Proem of such his Confirmation.

4. Afterwards when the Great Charter, commonly called *Magna Charta*, * (which is nothing else than a recital, confirmation and corroboration of our Ancient English Liberties) was made and put under the Great Seal of England in the 9th year of King *Henry the 3d* (which was *Anno Do-*

* Lamb. p 218 Cook 1 part Instituter fol 155

* Continued by the Normans See *Spelmans Gloss* far, in the word *Jurata*.

mini

mini 1225.) Then was this Priviledge of Trials by Juries in an especial manner confirmed and establisht, as in the 14th Chapter, That no *Amercements* shall be asseſed, but by the Oath of good and honest men of the *Vicinage*. And more fully in that Golden Nine and twentieth Chapter---No Freeman shall be taken, or imprisoned, nor be disſeized of his Freehold or Liberties, or free customs, or be out-law'd or exil'd, or any other way destroyed, nor shall we pass upon him, or condemn him, but by the lawful judgment of his Peers, &c: Which Grand Charter having been confirmed by above thirty Acts of Parliament, the said right of Juries thereby, and by conſtrant usage, and common custom of **England**, which is the *common Law*, is brought down to us as our undoubted Birth-right, and the best inheritance of every **English** man. For as that famous Lawyer Chief Justice Cook in the words of Cicero, excellently avers, *Major Hereditas venit unicuique nostrum a jure & Legibus quam a Parentibus*: 'Tis a greater Inheritance, and more to be valued, which we derive from the **Fundamental constitution and Laws** of our Country, than that which comes to us from our respective Parents. For without the former, we have no claim to the Latter.

7. But has this method of trial never been attempted

8 The Jury mans

tempted to be invaded or justled out of practice?

B. 'Tis but rarely that any have arrived to so great a confidence For 'tis a most dangerous thing to shake or alter any of the Rules or Fundamental points of the common Law, which in truth are the main Pillars and Supporters of the Fabrick of the Common-Wealth. These are Judg Cooks words*. Yet sometimes it has been endeavoured. But so sacred & valuable was the Institution in the eyes of our Ancestors, and so tenacious were they of their Priviledges, and Zealous to maintain and preserve such a vital part of their Birth-right and Freedom, that no such attempts could ever prove effectual, but always ended with the shame and severe punishment of the rash undertakers. For example.

1. Andrew Horn an eminent Lawyer, in his Book entituled, *The Mirrour of Justices* (written in the Reign of K. Ed 1. now near 400 years ago) in the fifth Chapt. and first Sect. records, that the Renowned Saxon King Alfred caused four and forty Justices to be hang'd in one year as murtherers, for their false Judgments. And there recites their particular Crimes, most of them being in, on

* Essays made to overthrow Trials by Juries, all ways unsuccessful and severely punishd.

* 2 Institutes pag. 74

kin

kind or other Infringements, Violations, & Encroachments of and upon the Rights & Priviledges of Juries; amongst the rest, that worthy Author tells us, he *hanged one Justice Cadwine, because he judged one Hackwy to death without the consent of all the Furors; for whereas he stood upon his Fury of twelve, men, because three of them would have saved him, this Cadwine removed those three, and put others in their room, on the Fury, against the said Hackwy's consent.* Where we may observe, that tho' at last twelve men did give a Verdict against him, yet those so put upon him, were not accounted his *Furors*, by reason all, or any of them, who were first Sworn to Try him, could not (by Law) be removed, and others put in their stead. And that such **Illegal** alteration was then adjudged a Capital Crime, & forthwith the said *Cadwine* was *Hang'd*.

2. A Second instance I shall give you in the words of the L. C Justice Cook, 'Against this Ancient & *fundamental* Law (& in the face thereof) there was in the 13 Year of K. Hen. 7. cap 3. an Act of Parliament obtained (on fair preences, and a *specious* preamble, as to avoid divers mischiefs, &c.) whereby it was Ordain'd That from thenceforth as well *Justices of Assize*, as *Justices of the Peace* upon a bare Information for the King

* Cook 2d part Institutes. fol. 51.

before

10 The Jury Mans

before them made, without any finding or presentment by the verdict of Twelve men, should have full power and Authority by their discretions, to bear and determine all offences & contempts committed or done by any person or persons against the Form, Ordinance, or effect of any Statute made and not Repealed, &c. ' By your of which Act (saith Cook) shaking this Fundamental Law (he means, touching all Trials to be by Juries) ' It is not credible ' what Horrible Oppressions & Cruelties ' to the undoing of Multitudes of People, ' were committed by Sir Rich. Empson Kt. ' & Edm. Dudley Esq; (being Justices of the ' Peace) throughout Eng. & upon this unjust ' & injurious Act (as commonly in like cases ' it falleth out) a new office was erected, and ' they made Masters of the Kings Forfeitures.

But not only this Statute was justly soon after the decease of Hen. 7. Repealed by the Statute of the 1 Hen. 8. cap. 6. but also the said Empson & Dudley (notwithstanding they had such an Act to back them, yet it being against Magna Charta, & consequently void) were fairly executed for their pains; and several of their under Agents, as, Promoters, Informers, and the like, severely punished, for a warning to all others that shall dare (on any pretence whatsoever) infringe our English Liberties. For so the Lord * Cook having (elsewhere

* See Rich. Bakers Chron. p. 273 * 4. part. Inst. fol. 4.

with detestation mentioned their story, pathetically concludes, *Qui eorum vestigiis insistant, exitus perhorrescant* : Let all those who shall presume to tread their steps, tremble at their dreadful end. Other Instances of a latter date might be given, but I suppose these may suffice.

F. Yes surely ; and by what you have discoursed of the *Long continued use of Juries*, and the zealous regards our Ancestors had, not to part with them ; I perceive that they were esteemed a *special priviledg*. Be pleased therefore to acquaint me wherein the *excellency* and *advantages* to the people by that method of trial, above others, may consist ?

B. This question shews you have not been much conversant *abroad*, to observe the *miserable* condition of the poor people in most *other Nations*, where they are either *wholly* subject to the *despotick arbitrary* lusts of their Rulers, * or at best being under such Laws as render their *Lives LIBERTIES* and *ESTATES*, liable to be disposed of at the *discretion* of strangers appointed their Judges, most times *mercenary*, and Creatures of *Prero-*

* The benefits of being tried by juries

* See all this excellently made out, and more at large by the L. C. J. *Fortescue*, afterwards Chancellor to King Hen. 6 in his Book, *De Laudibus Legum Anglie* cap. 26, 27, 28, & 29.

II 2 The Jury mans

gative; sometimes malicious and oppressive, and often *partial* and corrupt. Or suppose them never so just and upright, yet still has the Subject no security against the attacks of unconscionable *Witnesses*; yea, when there is no sufficient *Evidence*, upon bare suspicions they are obnoxious to the *Tortures of the Rack*, which often make an *innocent* man confess himself *guilty*, meerly to get out of present pain. Is it not then an *inestimable happiness* to be born and live under such a *mild* and righteous Constitution wherein all these mischiefs (as far as humane prudence can provide) are prevented; where none can be condemn'd, either by the power of superior enemies, or the rashness or ill-will of any *Judge*, nor by the bold Affirmations of any *profligate evidence*; But no less than *Twelve, honest, substantial, impartial men*, his neighbours (who consequently cannot be presumed to be unacquainted either with the matters charged, the Prisoners course of life, or the credit of the Evidence) must first be fully *satisfied* in their Consciences, that he is *guilty*, and so all unanimously pronounce him upon their *Oaths*. Are not these think you, very *material priviledges*.

7. Yes certainly, though I never so well consider'd them before. But now plainly

plainly see our fore-fathers had, and we still have *all the reason in the world* to be zealous for the maintainance and preservation thereof from subversion or encroachments, and to transmit them *intire* to posterity. For if once this *bank* be broken down or neglected, an *ocean* of oppression, and the ruins of infinite numbers of people, (as in *Empson* and *Dudley's* days) may easily follow, when on any pretence they may be made *Crimina's*, and then fined in vast sums, with pretext to enrich the Kings Coffers, but indeed to feed those insatiate *Vultures* that promote such unreasonable Prosecutions. But since you have taught me so much of the *antiquity* and *excellency* of Juries, * I cannot but crave the continuance of your favour to acquaint me somewhat more particularly of their *office* and *power* by Law.

B. I shall gladly comply with so reasonable and just a request. *A Jury of twelve men are by our Laws the only proper Judges of the matter in issue before them.* As for Instance *

1. That Testimony which is delivered to induce a Jury to believe, or not to believe the matter of Fact in issue is called in Law EVIDENCE, because thereby the

* The Office and power of a Jury.

* See Cook 4th. part of Instit. fol. 84.

14 The Jury mans

Jury may out of many matters of Fact *Evidere veritatem*, that is, *see clearly the truth* of which they are proper Judges.

2. When any matter is sworn, Deed offered whether it shall be believed or not, or whether it be *true or false* in point of Fact, the Jurors are proper Judges.

3. Whether such an act was done in such or such a manner, or to such or such an *intent*, the Jurors are Judges. For the Court is not Judg of these matters, which are evidence to prove or disprove the thing in issue. And therefore the Witnesses are always ordered to *direct their speech to the Jury*, they being the proper Judges of their Testimony. And in all Pleas of the Crown (or matters Criminal) the Prisoner is laid, *to put himself for trial upon his Country*, which is explained and referred by the Clerk of the Court, to be meant of the Jury, saying to them, *Which Country you are*.

7. Well then, what is the part of the Kings *Justices*, or the Court? What are they to take Cognizance of, or do, in the Trials of mens Lives, Liberties, and Properties?

B. Their Office in General is to do *Equal Justice* and Right Particularly,

1. To see that the *Jury* be regularly *return'd* and *duely Sworn*.

2 To see that the Prisoner (in cases where 'in are

* The office of the Court in Trials
permittable

permissible) be allowed his lawful challenges.

3 To advise by Law whether such matter may be given in evidence or not, such a writing read or not, or such a man admitted to be a witness &c

4 Because by their Learning and Experience they are presum'd to be best qualified to ask pertinent questions, and in the most Perspicuous manner soonest to sift out truth from amongst tedious impertinent Circumstances & Tautologies ; they therefore commonly examine the witnesses in the Court, yet not excluding the Jury, who of right may, & where they see cause, ought to ask them any necessary questions, which undoubtedly they may Lawfully do with Modesty and Discretion, without begging any leave. For if asking leave be necessary, it implies in the Court a right when they list to deny it ; & how then shall the Jury know the Truth ? And since we see that Council, who too often (*---Pudet hæc opprobria nobis*) for their Fees strive only to baffle Witnesses, and stifle Truth, take up on them daily to interrogate the Evidence 'tis absurd to think that the Jurors should not have the same priviledg, who are upon their Oaths, and proper Judges of the matter.

5 As a Discreet and Lawful Assistant to the Jury, they do often recapitulate and sum up the heads of the Evidence ; but the Jurors are still to consider whether it be done truly

Vaughan's Reports in Bushell's Case. Fol. 144.

fully

16 The Jury mans

fully and impartially, (for one mans memory may sooner fail than *Twelve's*) He may likewise state the Law to them, that is, deliver his opinion where the case is difficult, or they desire it. But since *Ex facto, jus oritur*, all matter of Law arises out of matter of Fact so that till the Fact is settled there is no room for Law, therefore all such *discourses* of a Judge to a Jury are or ought to be *Hypothetical*, not *coercive*; conditional, and not *positive*; viz. If you find the fact *thus* or *thus*, (still leaving the Jury at liberty to find as they see cause) then you are to find for the Plaintiff. But if you find the Fact *thus* or *thus*, then you are to find for the Defendant, or the like, Guilty, or not Guilty in cases Criminal.

Lastly, They are to take the Verdict of the Jury, and thereupon to give Judgment according to Law. For the office of a Judge (as Cook well observes) is *jus dicere*, not *jus dare*; not to make any Law by strains of wit, or forced Interpretations, but plainly and impartially to declare the Law already established. Nor can they refuse to accept the Jurys Verdict when agreed: For if they should, and force the Jury to return, and any of them should miscarry for want of accommodation, it would undoubtedly be murder; and in such case the Jury may without crime force their

their liberty, because they are illegally confined, having given in their Verdict, and thereby honestly discharged their office, and are not to be starv'd for any mans pleasure.

F. But I have been told, That a Jury is only Judg of naked *matter of fact*, and are not at all to take upon them to *meddle with*, or regard *matter of Law*, but leave it wholly to the Court.

B. 'Tis most true, Jurors are *Judges* of matters of Fact, that is their *proper Province* their chief business; but yet not *excluding* the consideration of matter of Law, as it *arises* out of, or is *complicated* with, and *influences* the Fact. For to say, they are not at all to meddle with, or have respect to Law in giving their Verdicts, is not only a *false* position, and contradicted by every days *experience*; but also a very *dangerous* and *pernicious* one, tending to defeat the principal end of the Institution of Juries; and so subtilly to *undermine* that which was too strong to be *batter'd* down.

1. It is false: for though the direction as to matter of Law separately may belong to the *Judg*, yet must your *Jury* also apply *matter of Fact* and Law together; and from their consideration of, and a right judgment upon both, bring forth their Verdict: For do we not see in most general issues, as upon

18 The Jury mans

on *not guilty*, pleaded in *trespass*, breach of the peace, or *Fellony*, though it be matter in Law whether the party be a *trespasser* a breaker of the peace, or a *Felon*; yet the *Jury* do not find the *Fact* of the case by itself, leaving the Law to the Court; but find the party *guilty*, or *not guilty* generally. So, as though they answer not to the question singly, *what is Law*; yet they determine the Law in all matters where Issue is joyn'd. So likewise is it not every days practise, that when persons are Indicted for *murther*, the *Jury* does not only find them *guilty*, or *not guilty*, but many times upon hearing and weighing of circumstances, brings them in, either *guilty* of *Murther*, *Manſlaughter*, *per Infortunitus*, or *ſe defendendo*, as they ſee cauſe. Now do they not herein *complicately* resolve both Law and Fact? And to what end is it that when any person is prosecuted upon any *Statute*, the *Statute* it ſelf is uſually read to the *Jurors*, but only that they may *judg*, Whether or no the matter be within that *Statute*? But to put the buſineſs out of doubt, we have the *ſuffrage* of that *Oracle* of Law *Littleton*, who in his *Tenures*, *Se ct. 368* declares, That if a *Jury* will take upon them the knowledg of the law upon the matter, they may. Which is agreed to, likewise by *Cock* in his *Comment* thereupon. And

And therefore 'tis *false* to say, That the *Fury* hath not power, or doth not use frequently to apply the *Fact* to the *Law*; and thence taking their *measures*, judg of, and determine the *crime* or *issue* by their *Verdict*:

2 As *Jurics* have ever been vested with such Power by *Law*, so to exclude them from, or disseize them of the same, were utterly to defeat the end of their institution. For then if a person should be indicted for doing any common innocent act, if it be but clothed and disguised in the indictment with the Name of *Treason*, or some other high crime, & prov'd by *Witnesses* to have been done by him; the *Jury* though satisfied in *Conscience*, that the *Fact* is not any such offence as 'tis called, yet because (according to this fond opinion) they have no power to judg of *Law*, and the fact charged is fully proved, they should at this rate be bound to find him *Guilty*. And being so found the Judge may pronounce sentence against him, for he finds him a convicted *Traytor*, &c. by his *Peers*. And thus as a certain *Physician* boasted, That he had *kill'd one of his Patients with the best method in the world*; So here should we have an *innocent man* hang'd, drawn, and quarter'd, and all according to *Law*.

20 The Jury mans

7. God forbid that any such thing should be practised, and indeed I do not very fully understand you.

B I do not say it ever hath been, and I hope it never will be practised: But this I will say, that according to this Doctrine, it may be; and consequently Jurics may thereby be rendred rather a snare or engine of Oppression, than any advantage or Guardian of our Legal Liberties against Arbitrary Injustice, and made meer Properties to do the Drudgery, and bear the Blame of unreasonable Prosecutions. And since you seem so Dull as not to perceive it, let us put an Imaginary case, not in the least to abet any irreverence towards his Majesty, but only to explain the thing, and shew the absurdness of this Opinion.----

Suppose then a man should be indicted, *For that he as a false Traytor not having the Fear of God before his eyes, &c. Did Trayterously, Presumptuously against his Allegiance and with an intent to affront his Majesties Person and Government, pass by such or such a Royal Statue or Effigies with his hat on his head, to the great contempt of his Majesty and his Authority, the evil Example of others against the Peace, and his Majesties Crown & Dignity.* Being hereupon Arraigned, and having pleaded Not Guilty, suppose that sufficient Evidence should swear the matter of
Fact

Fact laid in the Indictment, viz. *That he did pass by the Statue or Picture with his Hat on*; now imagine yourself one of the Jury that were sworn to Try him, What would you do in the matter?

J. Do? Why I should be satisfied in my Conscience, That the man had not herein committed any *Crime*, and so I would bring him in Not Guilty.

B. You *speak* as any honest man would do: But I hope you have not forgot the point we were upon; suppose therefore when you thought to do thus, the Court, or one of your Brethren, should take you up and tell you, That it was out of your power so to do; For look ye (saith he) my Masters! we Jury-men are only to find matter of Fact, which being fully prov'd * as in this case before us it is, we must find the party Guilty; whether the thing be Treason or not, does not belong to us to inquire; 'tis said so here, you see in the Indictment; and let the Court look to that, they know best, we are not Judges of Law: Shall we meddle with niceties and punctilio's, and go contrary to the directions of the Court? So perhaps we shall bring our selves into a premunire (as they say) and perhaps never be suffered to be Jurymen again. No, no, the matter of Fact you see is proved, and that's our business, we

* An ordinary jury-mans Speech

must

22 The Jury Man

must go according to our Evidence, we cannot do less: truly 'tis something hard, and I pity the poor man, but we cannot help it, &c. After these notable documents, what would you do now?

J. I should not tell what to say to it; for I have heard several *Ancient Jury-men* speak to the very same effect, and thought they talk'd very wisely.

B. Well then, would you consent to bring in the man *Guilty*.

J. Truly I should be somewhat *unwilling* to do it; but I do not see which way it can be avoided, but that he must be found *guilty of the Fact*.

B. God keep every honest body from such *Jury-men*; have you no more regard to your Oath? to your Conscience? to Justice? to the *Life* of a man?

J. Hold! Hold! perhaps we would not bring him in *Guilty* generally, but only *Guilty of the Fact*, Finding no more but *Guilty of Passing by the Statue with his Horse*.

B. This but poorly mends the matter, 'tis signifies little or nothing; For such a finding hath generally been refused by the Court as being *no Verdict*, though 'tis said it was lately allowed somewhere in a Case that required *Favour*. But suppose it were accepted, what do you intend shall become of the

Prisoner? must not be kept in Prison till all the Judges are at leisure and willing to meet and argue the business? Ought you not, and what Reason can you give why you should not absolutely acquit and discharge him? Nay, I do aver, you are bound by your Oaths to do it, by saying with your mouths to the Court, what your Consciences cannot but dictate to your selves, *Not Guilty*: For pray consider, Are you not sworn, *That you will well and truly Try, and true deliverance make*? There's none of this Story of *matter of Fact*, distinguish'd from Law in your Oath. But you are, *Well*, that is, *Fully and Truly*, that is, *Impartially*, to try the Prisoner. So that if upon the Consciences, and the best of the *Understanding* by what is proved against him, you find he is guilty of that *Crime* wherewith he stands charged, that is, deserving *Death*, or such other *Punishment*, as the Law inflicts upon an Offence so *denominated*; then you are to say, he is *Guilty*. But, if you are not satisfied, that either the *Act* he has committed was *Treason*, or other *Crime*, (though it be never so often called so) or that the *Act* it self, if it were so criminal, was not *done*, then what remains but that you are to acquit him? For the end of *Juries* is to preserve

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serve Men from oppression, which may happen as well by imposing or ruining them for that as a Crime, which indeed is none, or at least not such or so great as is pretended, as by charging them with the Commission of that which in truth was not committed. And how do you well and truly Try, and true Deliverance make, when indeed you do but deliver him up to others to be Condemned, for that which your selves do not believe to be any Crime?

J. Well; but the *supposed Cases* is a Case *unsupposable*. It is not to be imagined, that any such thing should happen; nor to be thought, that the Judges will condemn any Man, though brought in Guilty by the Jury, if the Matter in itself be not so Criminal by Law.

B. 'Tis most true, I do not believe that ever that Case will happen. I put it in as a thing of apparent Absurdity, that you might the more clearly observe the unreasonableness of this Doctrine; but withal I must tell you, That 'tis not impossible that some other Cases may really happen, of the same or the like nature, tho' more fine and plausible. And though we apprehend not, that during the Reign of His Majesty that now is, (whose Life God long preserve) any Judges will be made

that would so *wrest the Law*; Yet what Security is there, but that some *Successors* may not be so cautious in their Choice? And though our *Benehes* of Judicature be at present furnish'd with Gentlemen of great Integrity, yet there may one day happen some *Troglan* or Kinsman of *Empsons*, to get in, (for what *has been*, may be) who *Empson*-like too, shall pretend it to be for his Masters Service, to encrease the number of Criminals, that his Coffers may be fill'd with *Fines* and *Forfeitures*. And then such mischiefs may arise. And Juries having upon confidence parted with their just Priviledges, shall *then too late*, strive to reassume them, when the number of Ill-presidents shall be vouched to inforce that as of *Right*, which in truth was at first a *Wrong* grounded on *Easiness* and *Ignorance*. Had our *wise and wary* Ancestors thought fit to depend so far upon the *Contingent Honesty* of Judges, they needed not to have been so zealous to continue the usage of *Juries*.

7. Yet still I have heard, that in every Indictment, or Information, there is always something of *Form* or *Law*, and something else of *Fact*; and it seems reasonable, that the Jury should not be bound up *nicely* to find every *Formality* therein expressed, or else to acquit (perhaps) a notorious Criminal,

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minal, but if they find the *Essential Matter* of the Crime, then they ought to find him Guilty.

B. You say *true*, and therefore must note, that there is a wide difference to be made between *Words of Course*, rais'd by * Implication of Law, and *Essential Words*, that either *make*, or really *aggravate* the Crime charged. The Law does suppose and imply every Trespass, Breach of the Peace, every Felony; Murder or Treason to be done *Ut & Armis*, with Force and Arms, &c. Now if a person be Indicted for Murder by *Poison*, and the Matter proved, God forbid the Jury should scruple the finding him *Guilty* upon the Indictment, merely because they do not find that part of it, as to *Force and Arms*, proved. For that is implied as a necessary or allowable *Fiction of Law*:

But on the other side, when the matter in Issue in it self, and taken as a naked Proposition, is of such a Nature, as no Action, Indictment, or Information will lie for it *singly*, but it is *work'd up* by special Aggravations into Matter of Damage or Crime, as that it was done to *scandalize the Government*, to *raise Sedition*, to *affront Au*

* How far aggravating words, or those of course in Indictments or Information are to be regarded.

thority

guilty, or the like, or with such or such an ill intent. If these Aggravations, or some overt Act to manifest such ill Design, or Intention be not made out by Evidence, then ought the Jury to find the Party Not Guilty; for example.

Bishop *Latimer*, (afterwards a Martyr in bloody Queen *Maries* days, for the Protestant Religion) * in a Sermon preached before the most excellent King *Edward* the sixth delivered these words. ' I must desire your Grace to hear Poor Mens Suits your self; the Saying is now, That Money is heard every where; if he be Rich, he shall soon have an end of his Matter, others are fain to go home with weeping Tears for any help they can obtain at any Judges Hand. Hear Mens Suits your self, I require you in Gods behalf, and put them not to the Hearing of these Velvet-Coats, these Up-skips. Amongst all others, one especially moved at this time to speak; This it is, Sir! A Gentlewoman came and told me, that a Great Man keepeth certain Lands of hers from her, and will be her Tenant in spite of her Teeth. And that in a whole Twelve-month she could not get but one day, for the Hearing of her Matter, and the same day, when it

* See *Latimer's* Sermon cl. 41. the Second Sermon before King *Edward* the sixth,

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should be heard, the Great Man brought on his side a great many Lawyers for his Counsel, the Gentlewoman had but one Man of Law, and the Great Man shakes him so, that he cannot tell what to do; so that when the Matter came to the Point, the Judge was a means to the Gentlewoman, that she should let the Great Man have a quietness in her Land: I beseech your Grace, that ye would look to these Matters. And you proud Judges! Harken what God saith in his Holy Book; *Audite illos ita parvum ut magnum*, Hear them (saith he) the Small as well as the Great, the Poor as well as the Rich, regard no Person, fear no Man: And why? *Quia Domini Judicium est*, The Judgment is Gods. Mark this Saying, thou proud Judge, The Devil will bring this Sentence against thee at the Day of Doom. Hell will be full of these Judges, if they repent not, and amend, they are worse than the wicked Judge that Christ speaketh of *Luke the 19th*, that neither feared God nor the World. Our Judges are worse then this Judge was; for they will neither hear Men for Gods sake, nor fear of the World, nor Importunateness, nor any thing else; yea some of them will command them to Ward, if they be importunate. I heard say, That when

When a Suiter came to one of them, he said, What fellow is it that giveth these folks counsel to be so importunate? he deserves to be Punished and Committed to Ward. Marry sir! punish me then; It is even I that gave them Counsel, I would gladly be punished in such a Cause, and if you amend not, I will cause them to cry out upon you still, even as long as I live.--These are the very words of that good Bishop and Martyr Father *Latimer*.

F. Truly they are somewhat *Bold*; but I think very *Honest* ones. But what signify they to our discourse?

B. Only this, suppose the Judges of those times, thinking themselves aggrieved by such his *Freedom*, should have brought an *Indictment* against him, setting forth, *that* *he* *sa* *id* *fa* *ls* *ly* *a* *n* *d* *ma* *li* *ci* *ou* *s* *l* *y* *i* *n* *t* *e* *n* *d* *i* *n* *g* *t* *o* *s* *c* *a* *n* *d* *a* *l* *i* *z* *e* *t* *h* *e* *G* *o* *v* *e* *r* *n* *m* *e* *n* *t* *a* *n* *d* *t* *h* *e* *A* *d* *m* *i* *n* *i* *s* *t* *r* *a* *t* *i* *o* *n* *o* *f* *J* *u* *s* *t* *i* *c* *e* *i* *n* *t* *h* *i* *s* *R* *e* *a* *l* *m*, *a* *n* *d* *t* *o* *b* *r* *i* *n* *g* *t* *h* *e* *s* *a* *m* *e* *i* *n* *t* *o* *C* *o* *n* *t* *e* *m* *p* *t*, *h* *e* *d* *i* *d* *s* *p* *e* *a* *k*, *p* *u* *b* *l* *i* *s* *h* *a* *n* *d* *d* *e* *c* *l* *a* *r* *e* *t* *h* *e* *f* *a* *l* *s* *e* *a* *n* *d* *s* *c* *a* *n* *d* *a* *l* *o* *u* *s* *w* *o* *r* *d* *s* *b* *e* *f* *o* *r* *e* *c* *o* *r* *d* *e* *n* *t* *i* *d*.

for F I conceive the Judges had more *Wisdom* than to trouble themselves about such a *poor* *Business*.

B That's nothing to the purpose, but suppose I say by them or any body else, *That* *it* *h* *a* *d* *b* *e* *e* *n* *d* *o* *n* *e*, *a* *n* *d* *h* *i* *s* *s* *p* *e* *a* *k* *i* *n* *g* *t* *h* *e* *w* *o* *r* *d* *s*

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words had been proved, and you had been Living and one of the Jury.

7. I would have pronounced him *Guilty*, and been *starv'd* to Death before I would have consented to a contrary Verdict, because the words in themselves are not *Criminal*, nor reflecting upon any particulars, and as for what is supposed to be laid in the Indictment or Information, that they were published or spoken to *scandalize the Government and the Administration of Justice, or to bring the same into Contempt*, nothing of that appears.

Bar. You resolve as every Honest, Understanding, Conscientious man would do in the like case, for when a man is Prosecuted for that which in it self is *no Crime*, how dreadfully soever it may be set out, as the Inquisitors in *Spain* use to Cloath Innocent Protestants, whom they Censure to the Flames, with *Sambenito's* (Garments all over bepainted with Devils) that the people beholding them in so Hellish a dress, may be so far from pitying them, that they may rather Condemn them in their thoughts as Miscreants not worthy to Live, though in truth they know nothing of their Cause, yet I say notwithstanding any such *Bugg-bear Artifice*, an Innocent man ought to be acquitted, and not he and all his family ruined and perhaps utterly undone, for words

or matters harmless in themselves, and possibly very well intended, but only rendered Criminal by being thus hideously dressed up and wrested with some far-fetch'd, forced and odious Construction.

7. This is a matter well worthy the Consideration of all Juries, for indeed I have often wondred to observe the *Adverbs*, in Declarations, Indictments and Informations in some Cases to be harmless *Vinegar and Pepper*, and in others *Henbane steep'd in Aqua Fortis*.

B. That may easily happen, where the Jury does not distinguish Legal Implications, from such as Constitue, or materially aggravate the Crime, For if the Jury shall honestly refuse to find the latter in Cases where there is not direct proof of them, viz That such an Act was done *Falsely, Scandalously, Maliciously*, with an intent to raise *Sedition, Defame the Government*, or the like their mouths are not to be stoppt, nor their Consciences satisfied with the Courts telling them--*You have nothing to do with that its only matter of Form, or matter of Law, you are only to examine the Fact, whether he spoke such words, writ or sold such a Book, or the like*; For, now, if they should ignorantly take this for an Answer and bring in the Prisoner *Guilty*, though they mean and intend of the *Naked Fact, or bare Act only* yet

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yet the Clerk Recording it, demands a further Confirmation, saying to them thus, well then, you say A. B. is Guilty of the Trespasse or Misdemeanour in manner and form as he stands Indicted and so you say all, to which the Foreman Answers for himself and his Brethren Yes. Whereupon the Verdict is drawn up--*Furatores super Sacramentum suum dicunt, &c.* The Jurors do say upon their Oaths, that A. B. Maliciously, in Contempt of the King and the Government, with an intent to Scandalize the Administration of Justice, and to bring the same into Contempt or to Raise Sedition &c. (As the words before were laid) spake such words, published such a Book, or did such an Act against the Peace of our Lord the King, his Crown and Dignity.

Thus a Verdict so called in Law, *qualiter veritatis*, because it ought to be the Voice or Saying of Truth it self, may become composed in its material part of Falshood. Thus Twelve men ignorantly drop into a Perjury. And will not every conscientious man tremble to pawn his Soul under the sacred and dreadful solemnity of an Oath to attest and justify a Lie upon Record to all Posterity; besides the wrong done to the Prisoner, who thereby perhaps come to be hang'd (and so the Jury in foro conscientiae are certainly guilty of his Murder) or at least

least by *Fine* or *Imprisonment*) undone with all his Family, whose just *Curses* will fall heavy on such unjust Jury-men and all their posterity, that against their *Oaths* and *Duty* occasion'd their causeless misery. And is all this think you nothing but a matter of *Formality*?

J. Yes really, a matter of *Vast Importance* and *Sad Consideration*; yet I think you charge the mischiefs done by such Proceedings a little *too heavy* upon the *Jurors*; Alas good men! They *mean no harm*, they do but follow the *directions* of the Court, if any body ever happen to be to blame in such Cases it must be the Judges.

B. Yes forsooth! That's the Jury-mens *common plea*, but do you think it will hold good in the Court of Heaven? 'Tis not enough that we *mean no harm*, but we must *do none neither*, especially in things of that moment, nor will *Ignorance* excuse, where 'tis *affected*, and where duty obliges us to *Inform* our selves better, and where the matter is so plain and easie to be understood.

As for the Judges they have a fairer plea than you, and may quickly return the *Burthen* back upon the Jurors for *we*, (may they say,) *did nothing but our Duty* according to *usual Practise*, the *Jury* his Peers had found the *Fellow Guilty* upon their *Oaths* of such an *Odious*

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ous Crime, and attended with such vile, Presumptions, and dangerous Circumstances. They are Judges, we took him as they presented him to us. and according to our duty pronounced the Sentence, that the Law inflicts in such Cases, or set a Fine, or ordered Corporal punishment upon him, which was very moderate, Considering the Crime laid in the Indictment or Information, and of which they had so sworn him Guilty; if he were innocent or not so bad as Represented, let his Destruction lie upon the Jury, &c. At this rate (if ever we should have an unconscionable Judge,) might he argue; And thus the Guilt of the Blood or ruin of an innocent man when 'tis too late shall be Bandyed to and fro, and shuffled off from the Jury to the Judge, and from the Judge to the Jury, but really stick fast to both, but especially on the Jurors; because the very end of their Institution was to prevent all dangers of such oppression, and in every such Case, they do not only wrong their own Souls, and irreparably Injure a particular Person, but also basely betray the Liberties of their Country in General, for as without their ill-compliance and Act, no such mischief can happen; so by it, ill precedents are made, and the Plague is encreased, henceforward Juries are disheartned or seduc'd by Custom from their Duties, just Privileges

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ledges are lost by *disuser*, and perhaps within a while some of themselves may have an *hole* pickt in their Coats, and then they are Tried by another Jury just as wise and honest, and so deservedly come to smart under the Ruinating Effects and Example of their own Folly and Injustice.

Jurym. You talk of *Folly*, and blame Jurymen, when indeed they cannot help it, they would sometimes find such a Person *Guilty*, and such an one *Innocent*, and are perswaded they ought so to do, but the Court over-rules, and forces them, to do otherwise.

Barr. How I Pray?

Jurym How? Why, did you never hear a Jury *threatned to be Fined and Imprisoned*, if they did not comply with the Sentiments of the Court.

B. I have Read of such doings, but I never heard, or saw it done, and indeed I do not doubt but our Seats of Justice are furnisht with both better men and better Lawyers, than to use any such Menaces, or Duress, for undoubtedly 'tis a base and very Illegal Practise. But how ever will any man that fears God, nay that is but an honest Heathen debauch his Conscience, and forswear himself, do his Neighbour Injustice, betray his Countreys Liberties, and consequently enslave himself

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and his Posterity, and all this meerly because he is *Hector'd* and threatned a little?

J. I know it should not sway with any, but alas, a *Prison* is terrible to most men, whatever the Cause be; And the *Fine* may be such, if one shall refuse to comply, as may utterly ruin ones Family.

B. Fright not your self, there is no Cause for this *Ague-fit*, to shake your Conscience out of Frame; if you are Threatned 'tis but *Brutum Fulmen*, Lightning without a Thunder-bolt, nothing but words, for it is well known, That there is never a Judge in England that can Fine or Imprison any Jury-man in such a Case.

J. Good Sir! I am half asham'd to hear a Barrister talk thus; have not some in our memory been Fined and Imprison'd? And sure that which has actually been done is not altogether Impossible.

B. Your Servant Sir! Under favour of your mighty Wisdom and Experience when I said no Judge could do it, I spoke the more like a Barrister, for 'tis a Maxim in Law-*Id possumus quod jure possumus*. No man is said to be Able to do only so much as he may Lawfully do. But such Fines or Imprisoning cannot Lawfully be done.

the Judges have no *Right or Power* by Law to do it, and therefore it may well be said, they cannot, or are not able to do it.

And whereas you say, that some *Juries* in our memory have been Fined and Imprisoned, you may possibly say true, but 'tis as true, it hath been only in our Memory, for no such thing was practised in Ancient times, for so I find it asserted by a late Learned Judge * in these positive words; No Case can be offered, either before Attaints Granted in General, or after, that ever a Jury was punished by Fine or Imprisonment by any Judge, for not finding according to their evidence and his direction, until Pophams time, nor is there ~~such~~ proof, that he ever Fined them for that Reason, separated from other Misdemeanours. And Fol. 152. he affirms, That no man can shew, that a Jury was ever punished upon an Information either at Law or in the Star-Chamber, where the Charge was only for finding against their Evidence, or giving an untrue Verdict, unless Imbracery, Subornation, or the like were joyn'd. So that you see, the Attempt is an Innovation as well as unjust, a thing unknown to our Fore-fathers and the Ancient Sages of the Law; and therefore so much the more to be watcht against, resisted and suppressed. * Lord Chief Justice Vaughan in his Reports Fol. 146.

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whilst young, lest in time this crafty Cockatrice Egg hatcht and foster'd by Ignorance, and pusillanimous Compliance, grow up into a Serpent too big to be master'd, and so Blast and destroy the First-Born of our English Freedoms. And indeed (Blessed be God) it hath hitherto been rigorously opposed as often as it durst Crawl abroad, being Condemned in Parliament & knockt o'th' head by the Resolutions of the Judges upon solemn Argument. As by and by I shall demonstrate.

J. Well, but are Jurors not liable then to Fine or Imprisonment in any Case whatsoever.

B. Now you run from the Point; we were talking of giving their Verdict, and you speak of any Case whatsoever. Whereas you should herein observe a necessary distinction, which I shall give you in the words of that Learned Judge last Cited* *Much of the Office of Jurors in order to their Verdict is Ministerial; as not withdrawing from their Fellows after they are Sworn, not receiving from either side Evidence not given in Court; Not eating and drinking before their Verdict; Refusing to give a Verdict, &c. Wherein if they Transgress they may be punishable. But the Verdict it self, when given, is*

* Juries Office partly Ministerial, partly Judicial.
Naughan Rep. fol. 152.

not an Act Ministerial, but Judicial and (supposed to be) according to the best of their Judgment, for which they are not Finable, nor to be punisht but by Attaint; that is, by another Jury, in Cases where an Attaint lies, and where it shall be found that Wilfully they gave a Verdict false and Corrupt.

Now that Juries otherwise, are in no Case punishable, nor can (for giving their Verdict according to their Consciences and the best of their Judgment) be Legally Fined or Imprisoned by any Judge on Colour of not going according to their Evidence, or finding contrary to the directions of the Court, is a truth both founded on unanswerable Reasons and Confirmed by irrefragable Authorities.

J: These I would gladly hear.

B. They are many, but some of the most evident are these that follow.

As for Reasons.

1. A Jury ought not to be Fined or Imprisoned, because they do not follow the Judges directions, for if they do follow his direction, they may yet be attainted, and to say they gave their Verdict according to his directions is no Barr, but the Judgment shall be reversed and they punisht for doing that, which if they had not done, they should

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should (by this Opinion) have been Fined and Imprisoned by the Judge, for not doing it.--- Which is *Unreasonable*.

2. If they do not follow his direction, and be therefore Fined, yet they may be attainted, and so they should be doubly punished by distinct Judicatures for the same offence, which the Common Law never admits.

3. To what end is the Jury to be return'd out of the *Vicinage* (that is the Neighbourhood) whence the Issue ariseth ? To what end must Hundredors be of the Jury, whom the Law supposeth to have nearer knowledge of the Fact than those of the *Vicinage* in general ? To what end are they *challeng'd* so scrupulously to the *Array* and *Pole* ? To what end must they have such a certain Freehold, and be *Probi & Legales Homines*, and not of *Affinity* with the Parties concerned ? &c. If after all this, they *Implicitly* must give a Verdict by the Dictates and Authority of another Man, under pain of *Fines* and *Imprisonment*, when sworn to do it according to the best of their knowledge ; a man cannot see

by anothers eye, nor hear by anothers Ear, no more can a man conclude or infer the thing to be resolved by anothers understanding or reasoning, unless all Mens understandings were equally alike; and if meerly in compliance because the Judge *says thus or thus*, a Jury shall give a Verdict, though such their Verdict should happen to be *right*, true, and Just, yet they being not assured *it is so* from their own understanding, are *forsworn*, at least in *Foro Conscientiae*.

4. Were Jurors so finable, then every Major and Bailiff of Corporations, all Stewards of Leets, Justices of Peace, &c. whatever Matters are try'd before them, shall have *Verdicts to their minds*, or else Fine and imprison the Jurors till they have; so that such must be either pleased, humored, or gratified, else no Justice or Right to be had in any Court.

5 Whereas a Person by Law may Challenge the Sheriff or any Jurymen, if of Kin to his Adversary, yet he cannot challenge a Major, Recorder, Justice, &c. who 'tis possible will have a Verdict for their Kinsman, or against

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their Enemy, or else Fine and Imprison the Jury till they have obtained it; so that by this means our Lives, Liberties, and Properties shall be solely tried by, and remain at the Arbitrary dispose of every Mercenary or Corrupted Justice, Major, Bailiff, or Recorder, if any such should at any time get into Office.

6. Tis unreasonable that a Jury should be Finable on pretence of their going against their Evidence, because it can never be Tried whether or no in Truth they did find with or against their Evidence, by reason no Writ of Error lies in the case.

7. Were Jurymen liable to such Arbitrary Fines, they should be in a worse condition than the Criminals that are tryed by them; for in all Civil Actions, Informations, and Indictments, some Appeals, or Writs of false Judgment, or of Error, do lie into Superior Courts to try the regular Proceedings of the Inferior. But here can be no After Tryal or Examination, but the Jury-man (if Fining at all were Lawful) must either pay the Fine, or lie by it, without remedy, to decide whe-

ther in his particular Case he were legally Fined or not.

8. Without a Fact agreed, it is as impossible for a Judge or any other to know the Law, relating to that Fact, or direct concerning it, as to know an accident that hath no Subject ; for as where there is no Law, there is no Transgression, so where there is no Transgression, there is no place for Law ; for the Law (saith Divine Authority) is made for the Transgressor. And as Cook tells us, *Ex facto, Jus oritur*, upon stating the Fact or Transgression matter of Law doth arise, or grow out of the Root of the Fact. Now the Jury being the sole Judges of Fact, and Matter in Issue before them not finding the Fact on which the Law should arise cannot be said to find against Law, which is no other than a Superstructure on Fact ; so that to say they have found against the Law, when no Fact is found, is absurd ; an expression insignificant and unintelligible ; for no Issue can be joyned of matter in Law, no Jury can be Charged with the Tryal of matter in Law barely, no Evidence ever was or can be given to a Jury.

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Jury of what is Law, or not. Nor can any such Oath be given to, or taken by a Jury to try in matter of Law, nor does an Attaint for such Oath, if False, &c. But if by finding against the Direction of the Court in matter of Law, shall be understood, that if the Judge having heard the Evidence given in Court, (for he can regularly know no other, though the Jury may) shall tell the Jury upon this Evidence, the Law is for the Plaintiff, or the Defendant, and the Jury are under pain of Fine and Imprisonment to Find accordingly; 'tis plain the Jury ought of Duty so to do. Now if this were true, who sees not that the Jury is but a troublesome delay, of great charge much Formality, and no real use in determining Right and wrong, but meer Eccho's to sound back the pleasure of the Court; and consequently that Tryals by them might be better abolish'd than continued? Which is at once to spit Folly in the Faces of our Venerable Ancestors, and enslave our Posterity.

9. As the Judge can never direct

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what the Law is in any Matter Controverted, without first knowing the Fact, but from the Evidence which the Jury have; but he can never fully know what Evidence they have, for besides what is sworn in Court, (which is all that the Judge can know) the Jury being of the Neighbourhood, may, and oftimes do know something of their own knowledg, as to the Matter it self, the Credit of the Evidence, &c. Which may justly sway them in delivereing their Verdict, and which self knowledge of theirs is so far countenanced by Law, that it supposes them capable thereby to try the matter in Issue, (and so they must) though no Evidence were given on either side in Court. As when any man is Indicted, and no Evidence comes against him, the Direction of the Court alway is, *You are to acquit him, unless of your own knowledge you know him Guilty*; so that even in that Case they may find him Guilty without any witnesses. Now how absurd, is it to think, that any Judge has power to Fine a Jury for going

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going against their Evidence, when he that so Fineth knoweth perhaps nothing of their Evidence at all (as in the last Case) or at least but some part of it? For how is it possible he should lawfully punish them for that which is impossible for him to know.

Lastly, Is any thing more common than for two Lawyers or Judges to deduce *contrary* and opposite Conclusions out of the *same Case in Law*. And why then may not two men infer distinct Conclusions from the *same Testimony*? And consequently may not the *Judge* and *Jury* honestly differ in their Opinion or Result from the Evidence, as well as two *Judges* may, which often happens and shall the *Jury-men* meely follow this difference of Apprehension merit Fine and Imprisonment, because they do that which they cannot otherwise do, preserving their Oath and Integrity? especially when by *Law* they are presum'd to know *better* and much *more* of the *Evidence* than the *Judge* does as *afore* said.

Are not all these gross contradicting Absurdities? and (unworthy by any man that deserves a *Gown*) to be put upon the *Law of England*, which has ever own'd *Right Reason* for its Parent, and dutifully submitted to be guided thereby?

Jurym. If the *Law*, as you say, be *Reason*, then undoubtedly this Practice of *Fining of Juries* is most *Illegal*, since there cannot be any thing more *unreasonable*; But what *Authorities* have you against it?

Bara. You have heard it proved to be a *Modern* up-start encroachment, so you cannot expect any direct or express *Condemnation* of it in *Ancient Times*, because the thing was not then *set on Foot*. And by the way, though *Negative Arguments* are not necessarily conclusive, that we meet with no *Precedents* of old of *Juries Fined*, for giving their *Verdict* contrary to *Evidence*, or the *Sense* of the *Court*, is a violent presumption, that it ought not to be done; for it cannot be supposed, that this *Latter Age* did first of all discover, that *Verdicts* were many times not according to the *Judges Opinion* and *Liking*. Undoubtedly they saw that *Justice* as well as we; but knowing the same not to be any *Crime*, or punishable by *Law*.

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were so Modest and Honest as not to meddle with it. However, what entertainment it hath met with when attempted our times, I shall shew you in Two Remarkable Cases.

I. When the Late L. Ch. Justice *Keeling* had attempted something of that kind, it was complained of, and highly resented by the then *Parliament*; as appears by this Copy of their *Proceedings* thereupon taken out of their *Journal*, as follows.

Die Mercurii 11. Decembris 1667.

* The House resumed the Hearing of the
* rest of the Report touching the matter of
* *Restraint upon Juries*, and that upon the
* Examination of divers Witnesses in several
* Cases of Restraints put upon Juries by the
* Lord Chief Justice *Keeling*, and thereupon
* Resolved as followeth

* First, That the Proceedings of the said
* Lord Chief Justice in the Cases now Re-
* ported are *Innovations* in the Tryal of Men
* for their Lives and Liberties. And that he
* hath used an *Arbitrary* and *Illegal* Power,
* which is of dangerous Consequence to
* the Lives and Liberties of the People
* of *England*, and tends to the introduc-
* ting of an *Arbitrary* Government.

* Secondly, That in the Place of Judi-
* cature the Lord Chief Justice hath un-
* dervalued, vilified and contemned

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'na Charta, the great Preserver of
' our Lives, Freedom, and Property

'Thirdly, That he be brought to Tryal
' in order to condign punishment, in such
' manner as the House shall judge most
' fit and requisite.

Die Veneris 13. Decembris 1667.

' Resolved, &c.

' That the Precedents and Practice
' of *Fining* or *Imprisoning* of Jurors for
' giving their Verdicts is *Illegal*.

Here you see it *Branded* in *Parliament*;
Next you shall see it formally condemn'd
on a solemn Argument by the *Judges*.
The Case thus.

At the Sessions for *London* *Sept. 1670*
William Penn, and *William Mead* (two
of the People commonly called *Quakers*)
were Indicted, for that they with others,
to the number of 309, on the 14th. *Aug.*
22. *Regis*, in *Gray-Church-Street*, did with
Force and Arms, &c. unlawfully and tu-
multuously assemble and congregate them-
selves together to the disturbance of the
Peace; and that the said *William Penn* did
there Preach and speak to the said *Mead*
and other Persons in the open Street; by
Judicial reason whereof a great Concourse and Tu-
mult of People in the Street aforesaid then

The Sum of the Case of *Bushe* and the rest
of *Mr. Pen* and *Mr. Meads* Jury

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and there a long time did remain and continue, in contempt of our said Lord the King, and of His Law, to the great disturbance of his Peace, to the great Terror and disturbance of many of his Liege People and Subjects, to the ill example of all others in the like Case Offenders, and against the Peace of our said Lord the King, His Crown and Dignity.

The Prisoners pleading *Not Guilty*, it was proved, that there was a Meeting at the time in the Indictment mentioned, in *Gray Church-street*, consisting of three or four hundred People, in the open Street, that *William Pen* was Speaking or Preaching to them, but what he said the Witnesses (who were Officers and Souldiers sent to disperse them) could not hear. This was the effect of the Evidence; which Sir *John Howell*, the then Recorder, (as I find in the Print of that Tryal p. 14.) was pleased to sum up to the Jury, in these words.

You have heard what the Indictment is, 'tis for Preaching to the People in the Street, and drawing a Tumultuous Company after them, and Mr. *Pen* was speaking; if they should not be disturb'd, you

* Note, the Quakers have a Meeting-house in that Street, out of which they were then kept by Soldiers, and therefore they met as near to it as they could in the open Street.

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‘ see they will go on, there are three or
‘ four Witnesses that have proved this, that
‘ he did Preach there, that Mr. Mead did
‘ allow of it. After this you have heard by
‘ substantial Witnesses what is said against
‘ them; Now we are upon the Matter
‘ of Fact, which you are to keep to, and
‘ observe, as what hath been fully
‘ sworn, at your peril

This Tryal begun on the *Saturday*; the
Jury retiring, after some considerable time
spent in debate, came in, and gave this
Verdict, *Guilty of speaking in Gray-Church
Street.* At which the Court was offended,
and told them, *they had as good say nothing;*
Adding, *Was it not an unlawful Assembly?*
*you mean he was speaking to a Tumult of Peo-
ple there.* But the Foreman saying, what
he had delivered was *all he had in Com-
mission*, and others of them affirming, That
they allowed of no such words as an *un-
lawful Assembly* in their Verdict, They were
sent back again, and then brought in a
Verdict in writing, subscribed with all their
Hands in these words.

*We the Jurors hereafter named do find
William Pen to be guilty of Speaking or
Preaching to an Assembly met together in
Gray-Church-street the 14th of Aug. 1670.
And William Mead not Guilty of the said
Indictment.*

This

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* This the Court resented still worse and therefore sent them back again, and Adjourned till *Sunday morning*, but then too they insisted on the same Verdict, so the Court Adjourned till *Monday morning*; and then the Jury brought in the Prisoners generally *Not Guilty*, which was Recorded and allowed of. But immediately the Court fined them *Forty Mark* a man, and to lie in Prison till paid.

Being thus in *Custody*, *Edw. Buskel*, one of the said Jurors, on the 9th of Nov. following brought his *Habeas Corpus* in the Court of *Common Pleas*. On which the Sheriffs of *London* made Return, 'That he was detained by vertue of an Order of Sessions, whereby a Fine of Forty Marks was set upon him, and eleven others particularly named, and every of them being Jurors sworn to try the Issues joyned between the King, and *Pen and Mead*, for certain Trespasses, Contempts, unlawful Assemblies and Tumults, and

* Note, though this jury for their excellent Example of courage and constancy deserve the commendation of every good English-man, yet if they had been better advis'd, they might have brought the Prisoners in *Not Guilty* at first, saved themselves the trouble and inconveniences of these two Nights Restraint

who

who then and there did acquit the said
 Pen and Mead of the same, against the
 Law of this Kingdom, and against full
 and manifest Evidence, and against the
 direction of the Court in matter of Law
 of and upon the Premises openly in
 Court to them given and declared; and
 that it was ordered they should be Impri-
 soned till they severally paid the said Fine,
 which the said *Bushel* not having done,
 the same was the cause of his Caption
 and Detention.

The Court coming to debate the *validi-
 ty* of this *Return*, adjudged the same *insuf-
 ficient*; for

1. The Words, *Against full and mani-
 fest Evidence*, was too general a Cause; the
 Evidence should have been *fully* and
 particularly recited, else how shall the Court
 know it was *so full and evident*; they have
 now only the Judgment of the Sessions for
 it, that it was so; but, said the Judges, *Our
 Judgments ought to be Grounded upon our
 own Inferences and Understandings, and not
 upon theirs.*

2. It is not said, that they acquitted the
 Persons Indicted against full and manifest
 Evidence, *corruptly, and knowing the said
 Evidence to be full and manifest*; for other-
 wise it can be no Crime; for that may seem
 full

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full and manifest to the Court, which does not appear so to the Jurv.

3. The other part of the Return, viz. That the Jury had acquitted those Indicted, *against the direction of the Court in matter of Law*, was also adjudged to be *naught*, and unreasonable, and the *Fining of the Juries for giving their Verdict in any Case* concluded to be Illegal, for the several reasons before *recited*, and other Authorities of Law urged to that purpose; and all the Precedents and Allegations brought to justify the *Fine and Commitment* solidly *answered*; whereupon the Chief Justice delivered the *Opinion of the Court*, That the Cause of Commitment was *insufficient*; and accordingly the said *Bushel*, and other his Fellow-prisoners, were *discharged*, and left to the Common Law for *Remedy and Reparation of the Damages* by that tortious *illegal Imprisonment* sustained.

Which Case is (amongst others) Reported by that Learned Judge Sir *John Vaughan*, at that time Lord Ch. Justice of the Common Pleas, setting forth all the Arguments, Reasons, and Authorities on which the Court, proceeded therein; from which I have extracted most of the *Reasons* which before I recited for this Point, and for

for the greatest part in the very words of that Reverend Author.

7. This Resolution hath, one would think (as you said) *knock'd this Illegal Practise* on the Head, beyond any possibility of Revival, but may it not one day be denied to be Law, and the contrary Justified ?

Barr. No such thing can be done without apparent violating and subverting all Law, Justice, and Modesty ; for though the Precedent it self be valuable, and without further enquiry is wont to be allowed, when given thus deliberately upon solemn debate by the whole Court ; yet 'tis not only that, but the sound substantial and everlasting Reasons, whereon they grounded such their Resolves, that will at all times justify Fining of Juries in such Cases to be Illegal ; besides, as the Reporter was most considerable, both in his Quality as Lord Chief Justice, and for his parts, soundness of Judgment, and deep Learning in the Law ; so such his Book of Reports is approved and recommended to the World, (as appears by the

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Page next after the Epistle) by the Right Honourable the present Lord Chancellour of *England*, Sir *William Scorggs*, Lord Chief Justice of *England*, My Lord North, Chief Justice of the *Common-Pleas* and in a word, by all the Judges of *England* at the time of Publishing thereof; so that it cannot be imagined how any Book can challenge greater Authority, unless we should expect it to be particularly confirm'd by Act of Parliament.

7. You have answered all my Scruples, and since I see the Law has made so good Provision for Jurymens priviledges and safety, God forbid any Jury-man should be of so *base* a temper, as to betray that (otherwise impregnable *Fortress* wherein the Law hath plac'd him, to preserve and defend the just Rights and Liberties of his Country, by treacherously surrendering the same into the hands of Violence or Oppression, though maskt under never so fair Stratagems and Pretences; for my own part, I shall not now decline to appear according to my

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my Summons, and therefore (though I fear I have detained you *too long* already) shall desire a little more of your direction about the Office of a Jury man, in particular that I may uprightly and *honestly* discharge the same.

B. Though I think from what we have discours'd being *digested* and improv'd by your own Reason, you may sufficiently Inform your self, yet to gratifie your request I shall add a few brief *Remarques*, as well of what you ought cautiously to *avoid*, as what you must diligently *pursue* and regard if you would justly and truly do your duty.

First, as to what you must avoid.
1. I am very confident, that you would not willingly violate the Oath which you take, but 'tis possible that there are such who as frequently break of them, as take them, through their careless custome on the one hand, or *Vi-lavish* fear on the other, against which I would fully caution you; that you may defend your self and others, against any Enemies of your Coun-
treys

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treys Liberties and happiness, and keep a good Conscience towards God and towards man.

2. 'Tis frequent, that when Juries are withdrawn that they may consult of their Verdict, they soon forget that Solemn Oath they took, and that *mighty Charge* of the Life and Liberty of men, and their Estates whereof then they are made Judges and on *their Breath* not only the *Fortunes* of the particular Party, but perhaps the preservation or *Ruin* of several Numerous Families does solely depend, now I say without due Consideration of all this, nay sometimes without *one serious thought*, or Consulted Reason offered *Pro or Con*, presently the *Foreman* or one or two that call themselves *Ancient Jury-men* (though in truth they never knew what belongs to the place more than a common *School Boy*) rashly deliver their *Opinion*, and *all the rest* in respect to their supposed *Gravity* and *Experience*, or because they have the biggest *Estates*, or to avoid the trouble of disputing the Point, or to prevent the spoiling

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ing of *Dinner* by delay, or some such weighty Reason, forthwith agree *blind fold*, or else go to holding up of hands or telling of *Noses*, and so the *Major Vote* carries away *Captive* both the Reason and the Consciences of the rest. Thus trifling with *Sacred Oaths*, and putting mens *Lives, Liberties and Properties* (as it were) to the hazard of *Cross or Pile*; This Practice or something of the like kind, is said to be too *Customary* amongst some Jurors, which occasions such their extraordinary *dispatch* of the weightiest or most *Intricate* matters, but there will come a time when they shall be called to a severe Account for their *Hast* and *Negligence*, therefore have a care of such *Fellow-Jurors*.

3. Such a *Slavish Fear* attends many Jurors, that let the Court but direct to find *Guilty* or *not Guilty*, though they themselves see no just Reason for it, yet oftentimes though their own Opinions are contrary, and their Consciences tell them it ought to go *otherwise*; yet, right or wrong accordingly they will bring in their *Verdict*; & there-
F
fore

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fore many of them never regard seriously the *course* and force of the Evidence, what and how it was delivered more or less to prove the Indictment, &c. But as the Court Sums it up, they find ; as if Juries were appointed for no other purpose but to *Eccho* back, what the Bench would have done ; Such a base temper is to be avoided, as you would escape being Forsworn, even though your Verdict should be right ; for since you do not know it so to be by your own Judgment or Understanding, you have *abused your Oath* and hazarded your own Soul as well as your Neighbours Life, Liberty or Property, because you *blindly depend* on the opinion or perhaps *passion* of others, when you were Sworn well and truly to try them *your selves*. Such an *implicite Faith* is near of Kin to truth that of *Rome* in Religion, and (at it, but least in the next degree) as dangerous thou-

4. There are some make a *Trade* of being Jury-men that seek for the Office, use means to be constantly continued in it, will not give a *disobliging* Verdict lest they should be *discharg*

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and serve no more, these *standing* *Ju-*
rors have certainly some *ill-game* to
 play, there are others that hope to
Signalize themselves to get a better
 Trade, or some *Preferment* by *serving*
a Turn; there are others that have
 particular *Piques* and a humour of Re-
 venge against such or such *Parties* if
 a man be but *miscalld* by some Odious
 name, or said to be of an exploded
 Faction-streight they cry *hang him,*
find him Guilty, no punishment can be
 too bad for such a *Fellow*, in such a
 case they think it merit to *Stretch* an
 Evidence on the tenter-hooks, and
strain a Point of Law because they
 fancy it makes for the Interest of the
 Government. As if *Injustice* or *Op-*
pression could in any case be for the
 true Interest of Government when in
 truth nothing more *weakens* or *destroys*
 (as it, but this was an old stratagem, if
 thou suffer this man to escape, thou shalt
 be *Cæsars* Friend. When *Cæsar*
 was so far from either *needing* or *thank-*
ing them for any such base Services,
 what had he but truly understood them

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he would severely have punished their *Partiality* and Tyranny.

All these and the like *pestilent Biases* are to be avoided and abominated by every honest Jury-man.

But now as to the positive Qualifications requisite.

1. You that are Jury-men should first of all seriously regard the weight and importance of the Office; your own Souls, other mens Lives, Liberties and Estates, all that in this World are dear to them, are at Stake, and in your hands; therefore consider things well before-hand, and come substantially furnished and provided with sound and well-grounded Consciences, with clear minds, free from malice, fear, hope or favour; lest instead of Judging others, thou shouldest work thy own Condemnation, and stand in the sight of God our Creator and Judge of all men, no better than a Murtherer, or Perjured Malefactor.

2. Observe well the Record, Indictment or Information that is read, and the several Parts thereof, both as to the matter, manner and form.

3 Take

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3 Take due notice and regard to the Evidence offered for Proof of the Indictment, and each part of it, as well to manner and form as matter; and if you suspect any Subornation, foul Practise, or Tampering hath been with the Witnesses, or that they have any malice or sinister design, have a special regard to the Circumstances or Incoherencies of their Tales, and endeavour by apt Questions to sift out the Truth, or discover the Villany. And for your better satisfaction endeavour to write down the Evidence or the Heads thereof, that you may the better Recall it to Memory.

4. Take notice of the nature of the Crime Charged, and what Law the Prosecution is grounded upon, and distinguish the supposed Criminal Fact which is proved, from the aggravating Circumstances which are not proved.

5. Remember that in Juries there is no Plurality of Voices to be allowed cannot over-rule or by vertue of Majority Conclude 5. no, nor 11. 1. But

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as the Verdict is given in the name of all the 12, or else it is void: So every one of them must be actually agreeing and satisfied in his particular Understanding and Conscience, of the truth and Righteousness of such Verdict, or else he is forsworn; and therefore if one man differ in Opinion from his Fellows, they must be kept together, till either they by strength of Reason or Argument can satisfy him, or he convince them. For he is not to be Hecktor'd, much less punisht by the Court into a Compliance; for as the L. Ch. Justice *Vaughan* says well, if *a man differ in Judgment from his Fellows whereby they are kept a day and a night, though his dissent may not in truth be as reasonable as the Opinion of the rest that agree, yet if his Judgment be not satisfied, one disagreeing can be no more criminal than four or five disagreeing with the Rest.* Upon which occasion the said Author recites a Remarkable case out of an Antient Law-Book, a *Furor* would not agree with his Fellows for two days, and being demanded by the Judges, if he would agree, said, he would first die in.

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in Prison, whereupon he was Committed, and the Verdict of the Eleven Taken, but upon better advice, the Verdict of the Eleven was Quasht, and the Furor discharged without Fine, and the Justices said the way was to carry them in Carts (this is to be understood at Assizes where the Judges cannot stay but must remove in such a time into another County) until they agreed, and not by Fining them. And as the Judges err'd in taking the Verdict of the Eleven, so they did in Imprisoning the Twelve. And therefore you see on second thoughts releas'd him.

6. Endeavour as much as your circumstances will permit at your spare Hours to Read and understand the Fundamental Laws of the Country; such as *Magna Charta*, the Petition of Right, the late excellent Act for *Habeas Corpus*, *Horns Mirrour of Justices*, Sir *Edw. Cook*, in his 2d. 3d. and 4th. parts of the *Institutes of the Law of England*, and *Jud. Vaughans Reports*, these are Books frequent to be had, and of excellent use to inform any reader of Competent Apprehension, of the True Liberties & Pri.

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Priviledges which every *English* Man is Justly entituled unto, and Eftated in by his Birth-right, as alfo the nature of Crimes and the punishments feverally and refpectively Inflicted on them by Law, the Office and dutys of Judges, Juries, and all Officers and Minifters of juftice, &c. Which are highly neceffary for every Jury-man in fome Competent Measure to know, for the Law of *England* hath not placed Tryals by Juries to ftand between men and Death or Destruction to fo little purpofe as to Pronounce men Guilty, without regard to the nature of the Offence, or to what is to be Inflicted thereupon.

For want of duely understanding and confidering thefe things, Juries many times plunge themfelves into lamentable perplexities: as it befel the Jury who were the Tryers of Mr. *Udal* Minifter, who in the 32^d year of Q. *Iaiz* was Indicted and Arraigned at *Oyden* in *Surry*, for High Treafon, for defaming the Queen and Her Government in a certain Book Intituled, *Demonstration of the Discipline*, &c. And

And though there was no Direct, but a scrambling shadow of proof, and tho' the Book duly considered contained no matter of Treason, but certain words which by a forced construction were laid to tend to the defamation of the Government, and so the thing prosecuted under that name ; yet the Jury not thinking that in pronouncing him Guilty, they had upon their Oath pronounced him Guilty of Treason, and to die as a Traytor ; but supposing that they had only declared him Guilty of making the Book, hereupon they brought him in Guilty, but when after the Judges Sentence of Death against him (which they never in the least intended) they found what they had done, they were confounded in themselves, and would have done any thing in the world to have Revok'd that unwary pernicious Verdict, when alas ! it was too late. Dr. Fuller has this witty note on this witty Gentlemans Conviction, that it was Conceived rigorous in the greatest, which at best (faith he) is cruel in the least Degree. And it seems so Q.

Elizabeth

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Elizabeth thought it, for she suspended Execution, and he Dyed Naturally. But his Story survives to warn all Succeeding Jurymen to endeavour better to understand what it is they do, and what the Consequences thereof will be.

7 As there is nothing I have said intended to encourage you to partiality, or tempt any Jury-man to a Connivance at Sin and Malefactors, whereby those Pests of Society should avoid being brought to condign punishment, and so the Law cease to be a terror to evil-doers, which were in him an horrible Perjury, and indeed a foolish pity or *Crudelis misericordia*, a Cruel Mercy; for he is highly injurious to the Good that absolves the Bad, when real Crimes are proved against them; so that I must take leave to say, That in Cases where the matter is dubious, both Lawyers and Divines prescribe rather favour than rigour; an eminent and learned Judge of our own has in this Advice and Wish gone before me, *Malletm revera viginti facinorosos*

* Fortescue Ca. 27.

mortem

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mortem pietate evadere quam justum unum in juste condemnari. I verily (saith he) had rather twenty evil-doers should escape death through Tenderneſs or Pity than that an Innocent Man should be unjustly condemned.

I shall conclude with that excellent Advice of my Lord Cook, which he generally addreſſes to all Judges, but may no leſs properly be applyed to Jurors.

Fear not to do Right to all, and to deliver your [Verdict] juſtly according to the Laws; for Fear is nothing but a betraying of the Succours that Reason ſhould afford; & if you ſhall ſincerely execute Juſtice, to be aſſured of three things.

1. Though ſome may malign you, yet God will give you his Bleſſing.

2. That though thereby you may offend Great Men and Favourites, yet you ſhall have the favourable Kindneſs of the Almighty, and be his Favourites.

And laſtly, That in ſo doing, againſt all ſcandalous Complaints and

* In the Epilogue of the 4th part or Inſtitutes.

pragmatical

70 The Iury mans
pragmatical Devices against you, God
will defend you as with a Shield.
-- For thou Lord wilt give a Blessing
unto the Righteous, and with thy favou-
rable Kindness wilt thou defend him as
with a Shield.

* Psal. 5. 15

F I N I S.



